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No. 10-515

In The Supreme Court of the United States

SARAH HATAM PETERSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a single offense of Structuring Transactions to Evade Reporting Requirements under 31 U.S.C. § 5324 itself constitutes a "pattern of unlawful activity" that warrants application of United States Sentencing Guideline § 2S1.3(b)(2)'s offense level enhancement.

Whether the term "pattern of unlawful activity," as used in U.S.S.G. § 2S1.3(b)(2), is ambiguous such that the "Rule of Lenity," reaffirmed in *United States v. Santos*, 128 S. Ct. 2020 (2008), applies.

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PETITION FOR A WRIT OF CERTIORARI

* * * *

Petitioner Sarah Hatam Peterson ("Peterson") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra* A-1) is reported at 607 F.3d 975. The orders of the district court (*id.* at A-13 to A-60) are unreported, but are reproduced in the attached appendix.

JURISDICTION

The opinion of the court of appeals was entered on June 17, 2010. (*Id.* at A-1) The court of appeals denied Peterson's petition for rehearing and rehearing en banc on July 13, 2010. (*Id.* at A-61). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

31 U.S.C. § 5324(a) provides:

> Domestic coin and currency transactions involving financing institutions. No person shall, for purposes of evading the reporting requirements of section 5313(a) or any regulation prescribed under any such section, the reporting or recordkeeping requirements imposed by any order issued under section 5326, or the

recordkeeping requirements imposed by any regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91-508 --

(1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a) or 5325 or any regulation prescribed under any such section, to file a report or to maintain a record required by an order issued under section 5326, or to maintain a record required pursuant to any regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91-508;

(2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) or 5325 or any regulation prescribed under any such section, to file a report or to maintain a record required by any order issued under section 5326, or to maintain a record required pursuant to any regulation prescribed under section 5326, or to maintain a record required pursuant to any regulation prescribed under section 21 of the Federal Deposit Insurance Act or section 123 of Public Law 91-508, that contains a material omission or misstatement of fact; or

> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

U.S.S.G. § 2S1.3(a) and (b) provide:

> (a) Base Offense Level:
>
> > (1) 8, if the defendant was convicted under 31 U.S.C. § 5318 or 5318A; or
> >
> > (2) 6 plus the number of offense levels from the table in § 2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the funds, if subsection (a)(1) does not apply.
>
> (b) Specific Offense Characteristics
>
> > (1) If (A) the defendant knew or believed that the funds were proceeds of unlawful activity, or were intended to promote unlawful activity; or (B) the offense involved bulk cash smuggling, increase by 2 levels.
> >
> > (2) If the defendant (A) was convicted of an offense under subchapter II of chapter 53 of title 31, United States Code; and (B) committed the offense as part of a pattern of unlawful activity

> involving more than $100,000 in a 12-month period, increase by 2 levels.
>
> (3) If (A) subsection (a)(2) applies and subsections (b)(1) and (b)(2) do not apply; (B) the defendant did not act with reckless disregard of the source of the funds; (C) the funds were the proceeds of lawful activity; and (D) the funds were to be used for a lawful purpose, decrease the offense level to level 6.

STATEMENT OF THE CASE

Federal law requires that financial institutions file reports with the Secretary of the Treasury whenever they are involved in cash transactions in excess of certain amounts. 31 U.S.C. § 5313(a). This law was enacted to circumvent the use of financial institutions as intermediaries by persons engaged in criminal conduct, and to assist in the investigation and prosecution of criminal and terrorist activities. 31 U.S.C. § 5311.

To deter individuals from avoiding these reporting requirements, Congress enacted antistructuring laws. 31 U.S.C. § 5324. Specifically, it is unlawful for a person to break a single deposit that would trigger a financial institution's reporting requirement into several smaller deposits that would

not trigger the financial institution's reporting requirement. *Id.*

A person guilty of structuring is subject to sentencing under United States Sentencing Guideline ("U.S.S.G.") § 2S1.3. The base offense level for structuring is 6 and is increased based on the amount structured as outlined in the Theft Table at U.S.S.G. § 2B1.1. U.S. Sentencing Guideline Manual § 2S1.3(a)(2). Two additional levels are then added if (1) the defendant knew or believed that the funds were proceeds of unlawful activity or were intended to promote unlawful activity, or (2) the offense involved bulk cash smuggling. *Id.* at § 2S1.3(b)(1). Two more levels are then added if the defendant structured the funds "as part of a pattern of unlawful activity involving more than $100,000 in a 12-month period." *Id.* at § 2S1.3(b)(2). And "pattern of unlawful activity" is defined as "at least two separate occasions of unlawful activity involving a total amount of more than $100,000 in a 12-month period, without regard to whether any such occasion occurred during the course of the offense or resulted in a conviction for the conduct that occurred on that occasion." *Id.* at § 2S1.3, cmt. n.3. Finally, a defendant's offense level will be reduced to 6 under a safe harbor provision if parts (b)(1) and (b)(2) of § 2S1.3 were not applied, the defendant did not act with a reckless disregard as to the source of the funds, and the funds were proceeds of and used for a lawful purpose. *Id.* at § 2S1.3(b)(3).

Several courts of appeals have interpreted the structuring of a deposit as constituting only one unlawful act capable of prosecution. *See, e.g.*, *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002), *overruled in part on other grounds*, *United States v. Rybicki*, 354 F.3d 124, 144 (2d Cir. 2003); *United States v. Dashney*, 937 F.2d 532 (10th Cir. 1991); *United States v. Davenport*, 929 F.2d 1169 (7th Cir. 1991); *United States v. Nall*, 949 F.2d 301 (10th Cir. 1991). And this Court has defined structuring as "breaking up a single transaction above the reporting threshold into two or more separate transactions – for the purpose of evading a financial institution's reporting requirement." *Ratzlaf v. United States*, 510 U.S. 135, 136 (1994).

In this case, the district court applied U.S.S.G. § 2S1.3(b)(2)'s sentencing enhancement holding that the structuring of a single deposit itself constituted "a pattern of unlawful activity involving more than $100,000 in a 12-month period." (App., *infra* A-15 to A-16). The Fourth Circuit affirmed, holding for the first time, and in contravention of this Court's and the other courts of appeals' holdings, that each of the multiple smaller deposits comprising a single, larger structured deposit is itself an unlawful act. (*Id.* at A-11 to A-12).

As a result of the Fourth Circuit's holding, every defendant found guilty of structuring a single deposit over $100,000 will receive a two-level enhancement under U.S.S.G. § 2S1.3(b)(2), and the safe-harbor provision found in U.S.S.G. § 2S1.3(b)(3)

will be nullified in such structuring cases. Under the Fourth Circuit's pronouncement, a single unlawful act is now segmented and compounded to increase artificially a defendant's offense level under the U.S.S.G. Such a holding violates this Court's precedent, conflicts with other courts of appeals, is illogical and causes an absurd result, and violates the Rule of Lenity.

A. Proceedings Before the District Court

Peterson, who owned and operated a chiropractic practice in Northern Virginia, and her late husband, Donald Peterson ("Donald"), divorced in August 2007. (App., *infra* A-2). The divorce settlement required Peterson to pay Donald $500,000. (*Id.*) Peterson kept a large portion of the proceeds of her chiropractic practice in cash in a safe deposit box, and was to pay $100,000 of the divorce settlement from the monies held in the safe deposit box. (*Id.*) To keep a record of the payment, Peterson decided to deposit the money into her own account and then write a check to Donald thereafter.

Donald, a former stockbroker, told Peterson to break the $100,000 deposit into smaller deposits to avoid the paperwork that results from depositing such a large amount of money. (*Id.*) So from August 9, 2006 to August 29, 2006, Peterson made eleven deposits ranging from $8,300 to $9,500. (*Id.*) The total amount deposited was $101,200. (*Id.*)

On October 2, 2008, a Criminal Information was filed in the district court charging Peterson with

one count of Structuring Transactions to Evade Reporting Requirements, in violation of 31 U.S.C. § 5324(a)(3). (*Id.* at A-3). Pursuant to a written plea agreement, Peterson pled guilty to the single charge. (*Id.*)

In a Presentence Investigation Report, the probation officer recommended that the district court apply U.S.S.G. § 2S1.3(b)(2), which would enhance Peterson's offense level by two for committing the offense "as part of a pattern of unlawful activity." (*Id.*) By applying U.S.S.G. § 2S1.3(b)(2), the safe-harbor provision in U.S.S.G. § 2S1.3(b)(3), which would have reduced Peterson's offense level to 6, could not apply.

The plea agreement contemplated that the parties would litigate the applicability of U.S.S.G. § 2S1.3(b)(2) to this case. Peterson argued that the sentencing enhancement should not apply because, among other things, the one count of structuring a single deposit constituted only one unlawful activity that necessarily involved eleven transactions. (*Id.* at A-3 to A-4). Thus, because the crime itself could not be accomplished without the several smaller deposits, each of which was not unlawful, U.S.S.G. § 2S1.3(b)(2) should not apply.

The Government argued for application for the sentencing enhancement, contending that the act of structuring itself constitutes a "pattern of unlawful activity." Moreover, the Government argued that adopting Peterson's interpretation of

U.S.S.G. § 2S1.3(b)(2)(B) would lead to an illogical result and render § 2S1.3(b)(2)(A) superfluous.

At sentencing, the district court acknowledged that the language of U.S.S.G. § 2S1.3(b)(2) "could have been clearer," and has created a "problem." (App., *infra* A-14). In addition, the district court noted that "[i]t's a very close question." (*Id.* at A-15). Nevertheless, the court held that the sentencing enhancement for engaging in a "pattern of unlawful activity" does "apply when there is only one offense." (*Id.* at A-16). The court reached its conclusion, however, "with much less certitude" than normal and would not have been surprised if another court disagreed. (*Id.*)

After enhancing Peterson's offense level by two, the district court ordered that Peterson pay a $30,000 fine, $100 special assessment, and forfeiture amount of just over $10,000. (*Id.* at A-21). In addition, the district court sentenced Peterson to a prison term of twelve months and one day. (*Id.* at 20-21). One week later, however, the district court held another sentencing hearing, stating that it had improperly treated the calculated guideline range as determinative. (*Id.* at A-26). The district court vacated Peterson's prison term and, instead, sentenced Peterson to eight months in community confinement – in addition to the previously imposed financial penalties. (*Id.* at A-40).

B. The Court of Appeals' Decision

Peterson timely appealed the district court's sentence under Rule 4(b) of the Federal Rules of Criminal Procedure, and the Fourth Circuit maintained jurisdiction under 28 U.S.C. § 1291. The appeal raised three issues. First, whether a single offense of structuring constituted a "pattern of unlawful activity." Second, whether U.S.S.G. § 2S1.3(b)(2) applied to a defendant who did not act willfully. And third, whether the phrase "pattern of unlawful activity" used in U.S.S.G. § 2S1.3(b)(2) was ambiguous such that the Rule of Lenity applied.

The Fourth Circuit found that U.S.S.G. § 2S1.3(b)(2) applied in three situations. "First, it applies when the occasions of unlawful activity involving more than $100,000.00 are separate from the structuring offense itself." (App., *infra*, A-7). The court gave as an example a defendant who structures for the purpose of evading his taxes – tax evasion and structuring are two unlawful acts. (*Id.*) The court then held that the enhancement also applies in cases of "serial structuring," which the court defined as "a pattern of structuring activity involving more than $100,000.00 in any twelve-month period, and applies 'even in the absence of other criminal activity.'" (*Id.*) For instance, in *United States v. St. Michael's Credit Union*, 880 F.2d 579 (1st Cir. 1989), the defendant failed to file currency transaction reports fifty different times for twenty-five different customers – each of which constituted a separate unlawful act, although they collectively formed the basis of a single charge in the

indictment. (App., *infra* A-7). As support for applying U.S.S.G. § 2S1.3(b)(2) to these first two situations, the Fourth Circuit cited Courtney J. Linn, *Redefining the Bank Secrecy Act: Currency Reporting and the Crime of Structuring*, 50 Santa Clara L. Rev. 407 (2010). (*Id.*)

The Fourth Circuit cited no authority for its application of U.S.S.G. § 2S1.3(b)(2) to its "final situation," however, where "the structuring offense itself involves a pattern of unlawful activity." (*Id.* at A-7 to A-8). These situations, the court stated, "typically involve[] a defendant who structures a series of deposits totaling in excess of $100,000.00 to avoid triggering the bank's duty to report (perfect structuring) or in an attempt to defeat the bank's responsibility to report (imperfect structuring)." (*Id.*) Yet, the article cited by the Fourth Circuit refuted such a holding stating U.S.S.G. § 2S1.3(b)(2) does not apply to a defendant who possesses a single "cash hoard" of over $100,000 "and then breaks it into sub-$10,000 deposits" because in such a case the defendant "commit[ted] only one structuring violation, not a series of violations." *Redefining the Bank Secrecy Act*, 50 Santa Clara L. Rev. 407, 486 n.336.

Nevertheless, the court held that its construction was consistent with the framework of U.S.S.G. § 2S1.3 and Application Note 3 of that same section. (App., *infra* A-8 to A-9). The court found that § 2S1.3 punishes defendants more severely as the amount of funds structured increases, and that

leniency is given to defendants who structure isolated deposits that are less than $100,000. The safe harbor provision is, according to the court, "a very narrow opening" for those defendants who structure "an *isolated* monetary transaction or several monetary transactions that do not cross the $100,000.00 threshold." (*Id.* at A-9) (emphasis in original). By engaging in multiple transactions amounting to over $100,000, a defendant eliminates the possibility of a safe harbor reduction in his offense level. In addition, because the enhancement may be triggered by unlawful activity that occurs during the course of the offense of conviction, the court held its decision was consistent with Application Note 3 following U.S.S.G. § 2S1.3. (*Id.*)

Additionally, the court cited two purported "absurdities" that would result if the enhancement did not apply to a single structuring offense over $100,000. (*Id.* at A-9 to A-11). First, a defendant who structures a single $101,000 deposit would receive an offense level of 6, but a defendant who structures one $52,000 deposit and, later, a $49,000 deposit would receive a level of 14. (*Id.* at A-9 to A-10). The court ignored the fact that the second defendant made two separate, conscious choices to violate the law and focused instead on the fact that the total amounts involved were the same and, thus, the sentences should not be calculated differently. (*Id.*) Moreover, the court found that Peterson's interpretation of U.S.S.G. § 2S1.3(b)(2) would result

in a harsher sentence for the "imperfect"[1] structuring of $101,000 and a lesser sentence for the "perfect" structuring of the same amount. (*Id.* at A-10 to A-11).

Ultimately, the court held that "each separate deposit [in the structuring of a single larger deposit] is an unlawful act, as the government could base a prosecution on any one *or* all of the deposits." (*Id.* at A-11). Thus, the court concluded that "because Peterson made more than one unlawful deposit and the total of her eleven deposits in a twelve-month period exceeded $100,000.00, she committed her offense as part of a pattern of unlawful activity under U.S.S.G. § 2S1.3(b)(2)." (*Id.* at A-12). The court also rejected the argument that the Rule of Lenity required that the U.S.S.G. be construed in her favor because, according to the court, there was no ambiguity in § 2S1.3. (*Id.* at A-12).

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[1] Neither the U.S. Code nor the Sentencing Guidelines refer to "perfect" or "imperfect" structuring. The only reference counsel has found making such a distinction is the article, *Redefining the Bank Secrecy Act*, 50 Santa Clara L. Rev. 407, 438-40, relied on by the Fourth Circuit in some instances, but not others. There, "imperfect" structuring refers to a defendant's *attempt* to avoid a bank's reporting requirement by breaking a $10,000 deposit into smaller deposits that are made the same day and at the same bank, thus, nevertheless triggering the bank's reporting requirement because collectively the deposits exceeded the $10,000 threshold. "Perfect" structuring refers to a defendant's attempt to avoid a bank's reporting requirement by breaking a deposit into smaller deposits made either at different banks or at the same bank, but on different days so that the deposits made at a single bank on a single day do not collectively exceed $10,000.

REASON FOR GRANTING THE PETITION

The appropriate interpretation of 31 U.S.C. § 5324 and U.S.S.G. § 2S1.3 is critical now more than ever. The PATRIOT Act included many significant reforms to the Bank Secrecy Act that has heightened enforcement of financial institutions' reporting requirements to combat terrorist and other criminal activity. *Redefining the Bank Secrecy Act*, 50 Santa Clara L. Rev. 407, 422-26. In addition, this Court's decision in *United States v. Santos*, 128 S. Ct. 2020 (2008), and amendments to the traditional money laundering statutes in 18 U.S.C. §§ 1956 and 1957, has increased prosecutorial reliance on antistructuring statutes. *Redefining the Bank Secrecy Act*, 50 Santa Clara L. Rev. 407, 423-25. Indeed, since 2007, the Department of Justice and Department of the Treasury have formed review teams to investigate and prosecute crimes under the Bank Secrecy Act – structuring crimes in particular. *Id.* at 424-26. And courts across the country have struggled to consistently interpret and apply the relevant provisions of the U.S. Code and U.S.S.G. *See, e.g.*, *United States v. Flowers*, No. 5:10-cr-00005 (WD Ky. Sept. 17, 2010); *United States v. Bond*, No. 3:10-cr-00025 (D. Conn. Sept. 8, 2010); *United States v. Pelligrini*, 2008 U.S. Dist. LEXIS 97474 (D.N.J. Nov. 26, 2008); *United States v. Haymond*, No. 2:07-cr-00278 (WD Wash. July 2, 2008); *United States v. Bellemare*, No. 1:07-cr-00105 (D. Vt. June 26, 2008); *United States v. McVay*, No. 2:07-cr-00349 (ND Ala. June 10, 2008); *United States v. Hassan*, et al., No.

4:06-cr-00053 (ED Ark. March 6, 2008); *United States v. Bergen*, No. 3:07-cr-00294 (D. Conn. Feb. 29, 2008); *United States v. Lemley*, No. 3:07-cr-00210 (D. Conn. Feb. 20, 2008). The proper interpretation of the antistructuring statutes and corresponding U.S.S.G. is, therefore, critical to the countless prosecutions that have resulted and will continue to result from the government's ongoing initiative.

I. The Courts Of Appeals, As A Result Of the Fourth Circuit's Decision, Are Divided As To Whether U.S.S.G. § 2S1.3(b)(2) Applies To A Single Structuring Offense, And The Fourth Circuit's Decision Conflicts With This Court's Precedent And The Plain Meaning Of U.S.S.G. § 2S1.3(b)(2).

This Court defines the unlawful act of structuring as "break[ing] up a *single* transaction above the reporting threshold into two or more separate transactions – for the purpose of evading a financial institution's reporting requirement." *Ratzlaf v. United States*, 510 U.S. 135, 136 (1994) (emphasis added). Until now, every court to consider what constitutes the "unlawful" activity in a structuring offense has concluded that it is the act of breaking up a large deposit to avoid reporting that is unlawful, not the resulting smaller deposits derived from the initial deposit. *See United States v. Handakas*, 286 F.3d 92, 98-99 (2d Cir. 2002) ("structuring itself, and *not the individual deposit*, is the unit of crime . . . [because] each and every structuring offense, by nature entails multiple

transfers of funds in amounts small enough to avoid detection") (emphasis added); *United States v. Davenport*, 929 F.2d 1169, 1171 (7th Cir. 1991) (holding that 31 U.S.C. § 5324 "does not forbid the making of deposits. It forbids the structuring of *a* transaction. . . . The receipt and deposit of the $100,000 were the transaction that the [defendants] structured by breaking it up into multiple deposits. . . . There was *one structuring, one violation*") (emphasis added); *see also United States v. Nall*, 949 F.2d 301 (10th Cir. 1991); *United States v. Dashney*, 937 F.2d 532 (10th Cir. 1991). The Fourth Circuit, however, after acknowledging the case law to the contrary, held that each smaller deposit derived from a single larger deposit is unlawful, and defendants are subject to a sentencing enhancement found in § 2S1.3(b)(2) for engaging in a "pattern of unlawful activity" as a result. (App., *infra* A-11 to A-12).

This Court's, and the other courts of appeals', reasoning is consistent with the purpose and structure of the U.S.S.G. Section 2S1.3 takes into consideration several factors in fashioning a defendant's offense level. For instance, § 2S1.3(a)(2) alters a defendant's offense level based on the amount of money structured. In part (b)(1), a defendant's purpose in effectuating the offense is analyzed – subjecting the defendant to a higher offense level if he "knew or believed that the funds were proceeds of unlawful activity, or were intended to promote unlawful activity." And finally, in part

(b)(2), a defendant's culpability is measured based on the number of unlawful activities engaged in while violating the structuring laws.

Mirroring an enhancement provision in 31 U.S.C. § 5324(d)(2), U.S.S.G. § 2S1.3(b)(2) provides for a two level increase in a defendant's offense level if "the defendant . . . committed the offense as part of a pattern of unlawful activity involving more than $100,000 in a 12-month period." And in Application Note 3 of § 2S1.3, a "pattern of unlawful activity" is defined as "at least *two separate occasions of unlawful activity* involving a total amount of more than $100,000 in a twelve-month period, without regard to whether any such occasion occurred during the course of the offense or resulted in a conviction for the conduct that occurred on that occasion." (emphasis added). The two level increase "gives effect to Congress's manifest intent that cases of structuring involving certain aggravating factors, including serial structuring, be prosecuted more severely than cases of simple structuring." *Redefining the Bank Secrecy Act*, 50 Santa Clara L. Rev. 407, 486. Indeed, the courts of appeals have recognized that the legislative purpose underlying § 2S1.3(b)(2) was a desire "to punish severely serious, *continuing* violations" of the structuring laws. *United States v. So*, 755 F.2d 1350, 1355 (9th Cir. 1985) (citing *United States v. Kattan-Kassin*, 696 F.2d 893 (11th Cir. 1983)) (emphasis added).

In every case except Peterson's, every court that has enhanced a defendant's sentence under

§ 2S1.3(b)(2)(B) did so when there were either multiple structuring offenses involved or where a single structuring crime accompanied some other criminal activity. *See, e.g., United States v. Hovind*, 305 Fed. Appx. 615, 619 (11th Cir. 2008) (applied to defendants guilty of 45 structuring counts and other charges); *United States v. Ortiz Barrera*, 922 F.2d 664, 665 (11th Cir. 1991) (structured funds were the product of drug-related money laundering). Indeed, in *United States v. Handakas*, the Second Circuit stated that the statutory enhancement "provision is intended to enhance sentences for more serious structuring offenses; it is not a device for segmenting and compounding a single offense." 286 F.3d at 98. Thus, when a defendant structures a single, large deposit, which necessarily results in the depositing of several smaller deposits, § 2S1.3(b)(2) does not apply.

In addition to increasing a defendant's offense level based on certain aggravating factors, § 2S1.3 provides for a reduction in a defendant's offense level when certain mitigating factors are present. The unlawful act of structuring a deposit to avoid the reporting requirements is a regulatory offense that enhances the government's ability to track the proceeds of criminal activity. But structuring is not inevitably nefarious. That is why Congress provided a safe-harbor provision for those defendants who engage in a single act of structuring without a sinister purpose. Congress recognized that there are differences between a vacationer seeking to avoid the

perceived burden of paperwork by structuring her gambling winnings, a defendant who repeatedly structures several intended deposits in an effort to hide money, and a criminal who wishes to launder money through the continuous structuring of the proceeds of his illicit trade. Thus, where a defendant structures funds lawfully obtained, which are to be used for a lawful purpose, without also engaging in other unlawful activity involving more than $100,000, that defendant is entitled to a reduction in her offense level.

In this case, Peterson took a single deposit that was over the reporting threshold and divided it into eleven smaller deposits to avoid the reporting requirements. The funds were lawfully obtained from her chiropractic practice, and were to be used for a lawful purpose, the payment of a divorce settlement. Peterson did not seek to structure eleven separate deposits of an amount over $10,000, but sought only to structure a single deposit of $100,000. There was one unlawful act, one criminal charge, and one conviction based on the structuring of a single deposit.

The Fourth Circuit, however, ignored this Court's definition of structuring, every other courts of appeals' application of § 2S1.3, and the plain meaning of § 2S1.3(b)(2), and held for the first time that a single act of structuring itself constituted a "pattern of unlawful activity." Not only is the Fourth Circuit's decision contrary to every other court's interpretation of this provision, it causes

absurd results. The Fourth Circuit's decision provides that the same facts needed to satisfy the elements of a crime also constitute the facts needed to satisfy a sentencing enhancement for that same crime. In addition, vastly different defendants are now treated the same under the Fourth Circuit's reasoning; *i.e.*, an individual who structures $101,000 in cash proceeds from a property sale because of perceived paperwork issues is treated the same as a money launderer who structures several deposits totaling $101,000 for multiple drug dealing clients. In addition, a defendant such as Peterson who structures lawfully obtained funds amounting to $101,000, to be used for a lawful purpose, will receive a two level enhancement that a defendant who sells $11,000 in stolen goods each month for nine months and structures each of the monthly deposits will not receive.

* * * *

In sum, this Court and the Second, Seventh, Ninth, Tenth, and Eleventh Circuits have held that the structuring of a single large deposit to avoid a financial institution's reporting requirement is a single unlawful act. The Fourth Circuit for the first time held that the individual smaller deposits resulting from the initially structured deposit also constitute unlawful acts such that a defendant's offense level may be increased under U.S.S.G. § 2S1.3(b)(2) for engaging in a pattern of unlawful activity. This Court's intervention is necessary to resolve this split and to provide uniform guidance to

defendants, prosecutors, and judges on this important issue.

II. The Fourth Circuit's Decision Conflicts With This Court's Decisions In *Huddleston v. United States* And *United States v. Santos* Addressing The Rule Of Lenity.

The Rule of Lenity applies when there is either an "ambiguity or uncertainty in the language and structure of [an] Act." *Huddleston v. United States*, 415 U.S. 814, 831 (1974). This Court recently addressed the Rule of Lenity in *United States v. Santos*, 128 S. Ct. 2020 (2008), where the meaning of "proceeds" as used in the federal money-laundering statute was at issue. In that case, the Government argued that "proceeds" meant total receipts, which resulted in a harsher sentence, and the defendant argued that "proceeds" meant net profits, which resulted in a lesser sentence. *Id.* at 2024. This Court, relying on the plain meaning of "proceeds" as found in various dictionaries, found that the term "[made] sense under either definition" as used in the statute. *Id.*

Turning to the Rule of Lenity, this Court held that because "[u]nder either of the word's ordinary definitions, all provisions of the [statute] are coherent; no provisions are redundant; and the statute is not rendered utterly absurd . . . the tie must go to the defendant." *Id.* at 2025. Thus, where application of a statute is uncertain, and under two or more interpretations the statute makes sense, the Rule of Lenity requires that the interpretation most

favorable to a defendant be applied. *Id.* (citing *United States v. Gradwell*, 243 U.S. 476, 485 (1917); *McBoyle v. United States*, 283 U.S. 25, 27 (1931); *United States v. Bass,* 404 U.S. 336, 347-49 (1971)).

At a minimum, the phrase "pattern of unlawful activity," as applied to structuring offenses, is ambiguous. While § 2S1.3's Application Note 3 defines the phrase as "at least two separate occasions of unlawful activity involving a total amount of more than $100,000 in a 12-month period, without regard to whether any such occasion occurred during the course of the offense or resulted in a conviction for the conduct that occurred on that occasion," it does not define "unlawful activity." This is problematic with respect to structuring crimes because such crimes, by their nature, require several acts that in isolation are lawful, but in conjunction form the basis of an unlawful offense.

The plain meaning of "unlawful act" is "conduct that is not authorized by law; a violation of a civil or criminal law," Black's Law Dictionary 1574 (8th ed. 2004). The Fourth Circuit interpreted "unlawful activity" to include the several smaller deposits that comprise a single structuring offense, even though they cannot be prosecuted as separate unlawful acts. Even if the court's interpretation is sustainable, ignoring the absurdities that result from that interpretation, Peterson's interpretation is equally sustainable. Peterson argued that "unlawful activity" includes only that which is prohibited by statute and subject to criminal prosecution; *i.e.*, in

the structuring context, the breaking up of a large deposit to avoid reporting requirements. Contrary to the Fourth Circuit's holding, the smaller deposits that result from a single structuring offense are not themselves unlawful, but are merely the byproduct of the overall structuring offense. And while under Peterson's interpretation, a defendant structuring a single large deposit would receive a lesser offense level than a defendant who structures two or more larger deposits that, in total, are the same amount as the first defendant, such a result is consistent with the design of § 2S1.3(b)(2), which punishes those who repeatedly violate the structuring laws more severely. *See United States v. So*, 755 F.2d 1350, 1355 (9th Cir. 1985) (citing *United States v. Kattan-Kassin*, 696 F.2d 893 (11th Cir. 1983)).

Thus, because there is uncertainty as to whether a "pattern of unlawful activity" exists when the charged crime requires repeated acts, the Rule of Lenity should apply. And, ignoring the absurdities in the Fourth Circuit's holding, because under either of the proposed interpretations the statute remains coherent, and not repetitive or absurd, the interpretation most favorable to the defendant should be adopted. The enhancement provision in § 2S1.3(b)(2) should not, therefore, apply to a single structuring offense.

CONCLUSION

Because of the overwhelming importance in ensuring uniform application of the laws and Sentencing Guidelines for structuring offenses,

especially in light of the government's heightened effort to vigorously prosecute such offenses, this petition for a writ of certiorari should be granted.

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Respectfully Submitted,

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